RECORDS AND BRIEFS

No. 15-1485

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In The
Supreme Court of the United States

DISTRICT OF COLUMBIA, ANDRE PARKER, and ANTHONY CAMPANALE,

Petitioners,

v.

THEODORE WESBY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

AMICUS BRIEF OF THE STATE OF UTAH AND SEVENTEEN OTHER STATES IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Police officers found late-night partiers inside a vacant home belonging to someone else. After giving conflicting stories for their presence, some partiers claimed they had been invited by a different person who was not there. The lawful owner told the officers, however, that he had not authorized entry by anyone. The officers arrested the partiers for trespassing. The questions presented are:

1. Whether the officers had probable cause to arrest under the Fourth Amendment, and in particular whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' questionable claims of an innocent mental state.

2. Whether, even if there was no probable cause to arrest the apparent trespassers, the officers were entitled to qualified immunity because the law was not clearly established in this regard.

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STATEMENT OF *AMICI* INTEREST[1]

The States filing this *amicus* brief have a significant interest in ensuring that lower federal courts properly apply this Court's qualified immunity jurisprudence. Qualified immunity shields State officials from damages lawsuits under 42 U.S.C. § 1983 unless they are "plainly incompetent or . . . knowingly violate the law." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (internal quotation marks and citation omitted). Lower-court decisions that improperly narrow the qualified immunity defense – like the Court of Appeals' decision below – shrink the "breathing room" this Court has given State officials to govern and act when only opaque law guides their conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

This is especially so for police officers. "Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). "Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law." *Anderson v. Creighton*, 483 U.S. 635, 644 (1987).

When lower courts ignore those teachings, they upset the careful balance that this Court's qualified

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[1] The parties' counsel of record received notice of the intent to file this brief.

immunity precedent strikes in this critical area. Indeed, this case exemplifies the potentially dire consequences for State and local governments, their officers, and their constituents when that balance is upset. It warrants this Court's review.

SUMMARY OF ARGUMENT

Two police officers in the District of Columbia Metropolitan Police Department find themselves personally liable for a nearly $1 million judgment after losing qualified immunity (on summary judgment) for a § 1983 claim. For what allegedly unconstitutional act? Arresting twenty-one people for trespassing in a vacant house at 3:00 a.m. one Sunday morning, after the officers:

(1) received a complaint about raucous partying and possible illegal activity in the vacant house;

(2) went to the vacant house and saw that it lacked furnishings except a mattress on the floor and candles for light;

(3) discovered that the supposedly vacant house was far from deserted – twenty-one men and women (sixteen of whom are Respondents) were partying inside;

(4) watched some of the partiers run into other rooms upon the officers' arrival; or hide in closets; or remain in plain sight dressed only in bras and thong

underwear, with money hanging from their garter belts;

(5) smelled marijuana and saw the partiers holding cups of beer and liquor;

(6) heard inconsistent stories from the partiers – was it a bachelor party or a birthday party? – about why they were in the vacant house;

(7) learned that none of the partiers was the vacant house's owner, tenant, or lessee;

(8) heard from one or more of the partiers that a woman named "Peaches" or "Tasty" had invited them to the vacant house; yet

(9) confirmed that Peaches (or Tasty) was not then present in the vacant house;

(10) learned from a phone call with Peaches that she had invited the partiers to the vacant house, but under conflicting and evolving claims to authority – that she was "possibly" renting it, or negotiating a lease with the owner's grandson, or had received permission from the owner (or grandson) to host the party there – until she finally recanted and admitted that she in fact *did not* have permission to be in the vacant house, and had just left it, and would not return because she was afraid of being arrested; and

(11) spoke by phone to the vacant house's actual owner, who confirmed that he had discussed leasing the property to Peaches but had not yet signed a lease

agreement, and that the partiers *did not* have his permission to be in the vacant house.

(*See* Pet. 3-4.)

Amici agree with Petitioners that those facts established probable cause to arrest Respondents for trespassing. (*See* Pet. 17-19.) But this brief focuses on why the panel majority's decision stripping Petitioners of qualified immunity for arresting Respondents despite those facts – and the inferences an objectively reasonable officer could have drawn from them – also breaks from this Court's qualified immunity jurisprudence and warrants reversal.

First, the panel majority crafted a new rule that effectively injects an officer's subjective beliefs into the law of probable cause governing arrests for *mens rea* crimes. Under the panel majority's rule, when a suspect gives an excuse for his conduct, the inferences a reasonable officer *could have drawn* from that excuse (in light of other known facts) *cannot* be included within the totality of the circumstances establishing probable cause to arrest – unless the officer *subjectively* determined that the suspect's excuse could not be credited after accounting for all known facts.

Second, even if the panel majority's new rule were consistent with this Court's precedent – and it is not – at a minimum it adds an entirely new gloss on that precedent. By definition, new glosses cannot constitute clearly established law. Petitioners are thus entitled to

qualified immunity because their actions did not transgress any law or right about which they had clear notice.

ARGUMENT

I. States And Their Officials Rely On Federal Courts To Properly Apply Qualified Immunity So As Not To Unnecessarily Disrupt Governmental Functions.

"If men were angels, no government would be necessary." The Federalist No. 51, at 349 (James Madison) (J. Cooke ed. 1961). Our government's very existence thus attests that the women and men serving in it – like the citizens they serve – will not always perfectly comply with the law. They make mistakes.

But unlike all people, all mistakes are not created equal. Some arise from universal human foibles – well-meaning officials reasonably but mistakenly act based on misapprehended facts or unsettled law. Other mistakes, however, unreasonably violate a clear duty or law. Both reasonable and unreasonable mistakes can even violate citizens' constitutional rights.

When citizens seek redress for such violations, courts sort reasonable mistakes from unreasonable ones and grant qualified immunity to officials whose errors are reasonable. This Court's precedents teach (1) how courts identify reasonable mistakes, (2) how society benefits from making officials qualifiedly immune for reasonable mistakes, and (3) why qualified

immunity is available when law enforcement officers arrest criminal suspects on the reasonable but mistaken belief that probable cause supports the arrest. A proper understanding of each topic – discussed below – makes plain the error in the Court of Appeals' decision.

A. Qualified Immunity Yields Important Benefits To States And Their Officials, And To Society As A Whole.

This Court's precedents frown both on government officials unreasonably violating citizens' constitutional rights and on lawsuits against government officials for conduct that does not clearly cross that line. Neither is acceptable.

Qualified immunity helps to solve those two problems by "hold[ing] public officials accountable when they exercise power irresponsibly and" by "shield[ing] officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). It protects "officials from civil liability" when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (internal quotation marks and citations omitted).

Deciding when a law allegedly violated is "clearly established" is a crucial part of qualified-immunity analysis. "A Government official's conduct violates clearly established law when, at the time of the

challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635 (1987)). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640 (citations omitted).

Many of this Court's recent qualified immunity cases correct lower court decisions that unduly limit qualified immunity's availability by broadly defining when a challenged act's unlawfulness is apparent. Though the Court does "not require a case directly on point" before deeming a point of law to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. "We have repeatedly told courts . . . not to define clearly established law at a high level of generality." *Id.* at 742. Instead, the clearly-established inquiry "'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). The dispositive question is "whether the violative nature of *particular* conduct is clearly established." *al-Kidd*, 563 U.S. at 742 (emphasis added). Only by applying qualified immunity's "clearly established" requirement this way will the defense obtain

its proper scope – "protect[ing] 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* at 743 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

The benefits to State officials and to society from giving qualified immunity its due scope are well known. Officials benefit because qualified immunity gives them "breathing room to make reasonable but mistaken judgments." *Id.* at 743. Qualified immunity thus protects against a "chilling effect" on public officials' often difficult discretionary decisions. Ramadanah M. Salaam, Hope v. Pelzer: *The Supreme Court Revisits the Qualified Immunity Defense*, 26 Am. J. Trial Advoc. 643, 654 (2003). "This accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quoting *Davis v. Scherer*, 468 U.S. 183, 196 (1984)).

Those benefits for officials also confirm "the importance of qualified immunity 'to society as a whole.'" *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)). Qualified immunity staves off significant "social costs" to State governments from improper lawsuits – "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. And qualified immunity encourages public officials to confidently use

their best judgment on the public's behalf "in the unflinching discharge of their duties." *Id.* (citation omitted).

B. Law Enforcement Officers Who Reasonably But Mistakenly Conclude That Probable Cause Supports An Arrest Are Entitled To Qualified Immunity.

Qualified immunity has long been available to law enforcement officers – both to those "who were alleged to have violated the Fourth Amendment" generally, *Anderson*, 483 U.S. at 643 (citing *Malley*, 475 U.S. at 344-45), and specifically to officers like Petitioners "who 'reasonably but mistakenly conclude that probable cause is present'" and justifies arresting criminal suspects, *Hunter*, 502 U.S. at 227 (quoting *Anderson*, 483 U.S. at 641); *see also Pierson v. Ray*, 386 U.S. 547, 557 (1967). Those cases emphasize three critical principles that govern decisions about whether qualified immunity should shield officers from personal liability for an allegedly unconstitutional arrest.

First, in assessing whether an arrest violates a "clearly established" right, the right allegedly violated must be more specific than the general right to be free from arrests unsupported by probable cause. *See United States v. Sharpe*, 470 U.S. 675, 691 (1985). Assessing the clearly-established question at that "level of generality" would allow plaintiffs "to convert the rule of qualified immunity that [this Court's] cases

plainly establish into a rule of virtually unqualified liability." *Anderson*, 483 U.S. at 639.

Instead, the clearly-established inquiry must be more "particularized" to the case: Qualified immunity applies unless "a reasonable offic[er] would understand that" the specific arrest under review "violates that right" to be free from arrests unsupported by probable cause. *Id.* at 640; *see also Mullenix*, 136 S. Ct. at 309-10 (summary reversal); *Pearson*, 555 U.S. at 223 (reversing denial of qualified immunity because the law governing the particular alleged unlawful entry was not clearly established); *Brosseau*, 543 U.S. at 201 (judging reasonableness against the backdrop of the law that "squarely governs" at the time of the conduct).

Second, because an arrest's lawfulness is inextricably tied to what probable cause requires, courts must properly account for the case-specific flexibility inherent in those requirements. Probable cause for an arrest exists "if 'at the moment the arrest was made . . . the facts and circumstances within [the officer's] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing'" that the suspect had committed a crime. *Hunter*, 502 U.S. at 228 (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). That test "is not reducible to precise definition or quantification." *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013) (internal quotation marks omitted). It is instead "a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat

set of legal rules." *Id.* at 1056. And "[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the probable-cause decision." *Id.* at 1055 (brackets omitted). Thus probable cause for an arrest may exist even if the officer lacks the quantum of evidence on an element of the crime that "would be needed to support a conviction." *Adams v. Williams*, 407 U.S. 143, 149 (1972).

So when deciding whether probable cause supported an arrest, this Court has "rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach" that "consistently look[s] to the totality of the circumstances." *Harris*, 133 S. Ct. at 1055. Officers may find probable cause based only on "the kind of fair probability on which reasonable and prudent people, not legal technicians, act." *Id.* (internal quotation marks and brackets omitted).

Third, under this fact-specific, totality-of-the-circumstances approach, whether an officer had probable cause to arrest "generally turns on the 'objective legal reasonableness'" of the arrest. *Anderson*, 483 U.S. at 639 (quoting *Harlow*, 457 U.S. at 819). Put differently, this Court's "cases establish that qualified immunity shields" officers "from suit for damages if 'a reasonable officer could have believed'" the arrest "'to be lawful, in light of clearly established law and the information the arresting officers possessed.'" *Hunter*, 502 U.S. at 227 (quoting *Anderson*, 483 U.S. at 641) (brackets omitted).

This objective inquiry is just that – objective. It "will often require examination of the information possessed by the" arresting officers, but it "does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent." *Anderson*, 483 U.S. at 641. The officer's "subjective beliefs about the" arrest "are irrelevant." *Id.*

And a reviewing court's subjective beliefs are as irrelevant as the officer's. Courts must "analyze this question from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) (internal quotation marks and citation omitted). The "court should ask whether the [officers] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." *Hunter*, 502 U.S. at 228.

Reviewing officers' acts for objective reasonableness – in lieu of a plaintiff's invitation to engage in Monday-morning quarterbacking – comports with this Court's "frequent[] observ[ations]" and its "many cases . . . amply demonstrat[ing]" the point that it is "difficult[] [to] determin[e] whether particular searches or seizures comport with the Fourth Amendment." *Anderson*, 483 U.S. at 644. Police officers, like the Petitioners here, "routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them." *Davis*, 468 U.S. at 196. In such circumstances, "it is inevitable that law enforcement officials will in

some cases reasonably but mistakenly conclude that probable cause is present." *Anderson*, 483 U.S. at 641.

Even so, "[l]aw enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law." *Id.* at 644. Thus "judges should be cautious about second-guessing a police officer's assessment, made on the scene." *Ryburn v. Huff*, 132 S. Ct. 987, 991-92 (2012).

In sum, law enforcement officers "are entitled to qualified immunity" if – under the totality of the circumstances – "a reasonable officer could have believed that probable cause existed to arrest" the criminal suspect "in light of clearly established law and the information the arresting officers possessed." *Hunter*, 502 U.S. at 227-28 (internal quotation marks and brackets omitted).

II. The Court Of Appeals' Decision Denying Qualified Immunity To Petitioners Conflicts With Decisions Of This Court And Of Other Circuits, And Warrants Reversal.

The panel majority broke from this well-established qualified-immunity precedent in two important ways that support this Court's review.

First, it turned the objective-reasonableness, totality-of-the-circumstances test into a subjective test

that can actually prohibit officers from considering all the circumstances. Now, an officer must form subjective views about a suspect's proffered excuse for his conduct, and those subjective views will determine whether inferences an objectively reasonable officer could have drawn from those excuses can be considered as part of the broader facts establishing probable cause to arrest for a *mens rea* crime. That rule is a new one never before applied in an American court.

Second, because that rule is new, the panel majority erred by applying it retroactively as clearly established law at the time Petitioners arrested Respondents. This Court has long taught that new law cannot be applied retroactively to deny immunity for prior acts that, by definition, could not have violated it. But the panel majority did just that. Either error alone warrants reversal.

A. Petitioners' Conclusion That Probable Cause Supported Respondents' Arrests Was Objectively Reasonable, Even If Mistaken.

The panel majority's decision to strip Petitioners of qualified immunity cannot be reconciled with this Court's rule "that officers 'who reasonably but mistakenly conclude that probable cause is present are entitled to immunity.'" *Wesby v. District of Columbia*, 816 F.3d 96, 105 (D.C. Cir. 2016) (per curiam order den. pet. for reh'g en banc) (*Wesby II*) (Kavanaugh, J., dissenting

from den. of reh'g en banc) (quoting *Hunter*, 502 U.S. at 227).[2]

To be sure, the panel majority purports to avoid a conflict with *Hunter* by finding Petitioners' conclusion that they had probable cause to arrest Respondents to be *unreasonable* as a matter of law. "[N]o reasonable officer could have believed there was probable cause to arrest Plaintiffs for entering unlawfully," it reasoned, because the record lacked evidence of an element of the crime: Respondents' *mens rea*, or evidence "that a suspect 'knew or should have known that his entry was unwanted.'" *Wesby v. District of Columbia*, 765 F.3d 13, 26-27 (D.C. Cir. 2014) (*Wesby I*). In fact, according to the panel majority, "there was uncontroverted evidence that Plaintiffs believed they had entered at the invitation of a lawful occupant," *id.* at 26 – an assessment that, if true, would have eliminated probable cause for the arrest.

But that reasoning does not reconcile the decision below with *Hunter* – it fundamentally conflicts with it.

The most glaring conflict with *Hunter* is that, while paying lip service to the objective-reasonableness rule, the Court of Appeals effectively rewrites

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[2] Ten courts of appeals now refer to the *Hunter* rule by the shorthand "arguable probable cause." *See Wesby II*, 816 F.3d at 105-06 (Kavanaugh, J., dissenting) (citing cases). "Arguable probable cause exists if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met." *Garcia v. Jane & John Does 1-40*, 779 F.3d 84, 92 (2d Cir. 2015) (citations omitted).

Hunter to create a subjective-reasonableness test when suspects of a *mens rea* crime give officers excuses for their conduct. *See Wesby II*, 816 F.3d at 101 (Pillard, J., concurring in the den. of reh'g en banc). For, according to the court, whether an objectively reasonable officer could have doubted the truthfulness of the suspects' excuses is irrelevant to determining probable cause to arrest in such circumstances; instead, what matters is whether the "officers *actually doubt* a suspect's credibility." *Id.* at 100 (Pillard, J., concurring) (emphasis added). Accordingly, only an officer's subjective "actual[] doubt[s]" arising from potentially bogus excuses can constitute "conflicting information" about a suspect's *mens rea* worthy of an officer's taking "into account when assessing whether the totality of the circumstances support probable cause." *Id.* (Pillard, J., concurring).

That reasoning is fundamentally irreconcilable with the bedrock rule that qualified immunity "generally turns on the 'objective legal reasonableness' of the action." *Anderson*, 483 U.S. at 639 (quoting *Harlow*, 457 U.S. at 819). Objective tests, of course, ask what "a reasonable officer *could have believed*," *id.* at 641; what these *specific* officers "actually" believed, *Wesby II*, 816 F.3d at 100 (Pillard, J., concurring), matters not at all. Thus, any fair application of probable cause's objective test must include the judgments and conclusions an objectively reasonable officer *could have drawn* from the excuses – based on his training and experience – within the total information available in a probable-cause assessment, *regardless* of whether the specific

officers *actually* reached those conclusions. Yet the Court of Appeals walled off those considerations from the totality-of-the-circumstances calculus here because, in its view, Petitioners did not personally reach them.[3]

This never has been the law. Quite the contrary: Adhering to this Court's well-established precedent, all eleven courts of appeals that have addressed the issue (including a prior D.C. Circuit opinion) have held that judgments a reasonable officer *could have reached* about the suspect's truthfulness necessarily form part of the totality of the circumstances when assessing probable cause to arrest for a *mens rea* crime. *See Wesby II*, 816 F.3d at 107-08 (Kavanaugh, J., dissenting) (citing cases). The panel majority's clear break from these otherwise uniform cases warrants review and reversal.

Correcting for that one profound error confirms that Petitioners "are entitled to qualified immunity because they at least *reasonably could have believed* that they had probable cause" to arrest Respondents. *Id.* at 105 (Kavanaugh, J., dissenting) (emphasis in original). Respondents' conflicting excuses could have given an objectively reasonable officer ample reason to question

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[3] The Court of Appeals' conclusions about Petitioners' subjective beliefs are flawed in their own right. They are based on inferences from the evidence drawn against Petitioners, contrary to Rule 56's command that inferences are to be drawn in the nonmoving party's favor. Petitioners did not need to introduce evidence of their subjective beliefs in any event; such evidence is irrelevant under this Court's qualified-immunity precedent.

Respondents' *mens rea* – especially when viewed in the context of the full panoply of facts Petitioners already knew when they arrested Respondents. So under a straightforward application of this Court's precedents, Petitioners are entitled to qualified immunity: They had at least arguable – if not actual – probable cause to arrest Respondents.

B. The Cases That "Squarely Govern" Petitioners' Conduct Did Not Place Them On Notice That Respondents' Arrests Violated Clearly Established Law.

Petitioners are entitled to qualified immunity for the separate reason that the law upon which the panel majority relied to strip them of qualified immunity – its novel, erroneous view of probable cause discussed above – was not clearly established. To be sure, the judges concurring in the denial of rehearing *en banc* disputed the dissenting judges' conclusion that they were applying a new rule, downplaying their disagreement about the outcome here as "entirely fact-bound." *Wesby II*, 816 F.3d at 101 (Pillard, J., concurring) (internal quotation marks omitted). But this *post-hoc* justification actually proves otherwise.

In particular, on denial of rehearing *en banc*, the concurring judges "critici[zed]" the dissenting judges' view of probable cause, *id.* at 99 – evincing discord on a legal question that is indispensable to the panel majority's erroneous holding. Put simply, the dispositive disagreement between the concurring and dissenting

judges is a legal one: Whether inferences and conclusions a reasonable officer *could have drawn* from a suspect's own excuse for a *mens rea* crime should count as part of the totality of the circumstances that establish probable cause to arrest for that crime.

The concurring judges think not. In their view, inferences or conclusions an objectively reasonable officer could have drawn from those facts are "speculat[ive]" Band-Aids that cover investigatory gaps arising from a lack of tangible, real "evidence in the record." *Id.* (Pillard, J., concurring). And by "suggesting that" such speculation "could suffice to support probable cause" despite those gaps, the dissent allegedly "impermissibly shift[s] the burden of discerning probable cause." *Id.* at 100 (Pillard, J., concurring). "Officers may not do what the dissent does – posit that a person is up to no good and then ask whether there is clear reason to rule out any theoretical wrongdoing." *Id.* (Pillard, J., concurring). Indeed, the "bare, unsupported possibility that an officer *might have* disbelieved" Respondents' excuses "is not ground for arrest – nor for qualified immunity" – unless those "officers actually doubt [Respondents'] credibility." *Id.* (Pillard, J., concurring).

But that reasoning turns the firmly entrenched principles of probable cause discussed above on their head. The panel majority cites no case holding that inferences or conclusions an objectively reasonable officer *could have drawn* from the totality of circumstances to support probable cause must be *excluded* from that calculus when (1) a suspect's *mens*

rea is an element of the crime, (2) the suspect offers an innocent explanation for his conduct, and (3) the officer subjectively did not doubt those explanations. Neither have *amici* found one.

The absence of such authority is not surprising: The panel majority's view appears to contradict the otherwise uniform view of the courts of appeals. A suspect's "innocent explanations for his odd behavior cannot eliminate the suspicious facts from the probable cause calculus." *Sennett v. United States*, 667 F.3d 531, 536 (4th Cir. 2012) (quoting *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009)). That's because "[t]he test [for probable cause] is not whether the conduct under question is consistent with innocent behavior; law enforcement officers do not have to rule out the possibility of innocent behavior." *Id.* (quoting *Ramirez*, 560 F.3d at 1024); *see also Wesby II*, 816 F.3d at 107-08 (Kavanaugh, J., dissenting) (citing cases).

As a result, whatever else might be said about the panel majority's view, "one thing is crystal clear: No decision prior to the panel opinion here had prohibited arrest under D.C. law in these circumstances." *Wesby II*, 816 F.3d at 111 (Kavanaugh, J., dissenting). On the contrary – applicable D.C. Court of Appeals case law "clearly *permits* police officers to arrest a person for trespassing even when that person claims to have the right to be on the property, if a reasonable officer could disbelieve the suspected trespasser." *Id.*; *see also id.* at 109 (citing *Artisst v. United States*, 554 A.2d 327 (D.C. 1989); *McGloin v. United States*, 232 A.2d 90 (D.C. 1967)). "It is especially troubling that the [D.C.] Circuit

would conclude that [Petitioners were] plainly incompetent – and subject to personal liability for damages – based on actions that were lawful according to courts in the jurisdiction where [they] acted." *Stanton v. Sims*, 134 S. Ct. 3, 7 (2013).

So "[t]his should have been a fairly easy case for qualified immunity." *Wesby II*, 816 F.3d at 111 (Kavanaugh, J., dissenting). Regrettably, the panel majority did what this Court "has repeatedly told [it] not to do" – "create[] a new rule and then appl[y] that new rule retroactively against the police officers." *Id.* at 111 (Kavanaugh, J., dissenting).

III. The Court of Appeals' Pronounced Errors Warrant Summary Reversal.

The questions presented here are certworthy in their own right. (*See* Pet. at 11-16.) But because the Court of Appeals' errors are, at their core, different shades of gloss applied to a familiar sow's lips, summary reversal is also appropriate.

Specifically, the Court of Apeals failed to assess Petitioners' determination of probable cause for objective reasonableness – something this Court has repeatedly instructed lower courts to do. *E.g.*, *Hunter*, 502 U.S. at 227; *Anderson*, 483 U.S. at 638-39. And it failed to recognize that government officials have to be on notice that their conduct violates clearly established law – another principle this Court has repeatedly taught to lower courts. *E.g.*, *Sheehan*, 135 S. Ct. at 1777; *Plumhoff*, 134 S. Ct. at 2023; *Saucier*, 533 U.S. at

202, *overruled on other grounds by Pearson*, 555 U.S. at 223. All these prior cases "should have" made this "a fairly easy case for qualified immunity." *Wesby II*, 816 F.3d at 111 (Kavanaugh, J., dissenting).

Amici do not lightly suggest summary reversal. Yet that outcome follows from this Court's "often correct[ing] lower courts when they wrongly subject individual officers to liability," due largely to the "importance of qualified immunity to society as a whole." *Sheehan*, 135 S. Ct. at 1774 n.3 (citations and quotations omitted). Many of those decisions summarily reversed denials of qualified immunity to correct manifest error in the courts of appeals. *E.g.*, *Mullenix*, 136 S. Ct. at 309-10 (per curiam); *Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (per curiam); *Carroll v. Carman*, 135 S. Ct. 348 (2014) (per curiam); *Stanton*, 134 S. Ct. at 4-5 (per curiam); *Ryburn*, 132 S. Ct. 987 (per curiam). The errors here resemble those that the Court summarily corrected in those cases.

Indeed, the Court of Appeals did not have to reach the constitutional issue, but instead should have held that the contours of the rights Respondents asserted were not clearly established. *See Pearson*, 555 U.S. at 227. As this Court's precedents demonstrate, summary reversal is appropriate to correct that error. *E.g.*, *Carroll*, 135 S. Ct. at 348; *Stanton*, 134 S. Ct. at 7.

CONCLUSION

This Court should summarily reverse the judgment of the Court of Appeals. Alternatively, it should grant certiorari and reverse.

Respectfully submitted.

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